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No. 07-768

IN THE

Supreme Court of the United States

SHIRLEY A. GRAHAM,

Petitioner,

v.

HARTFORD LIFE & ACCIDENT INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the district court order remanding petitioner's disability-benefits claim to the plan administrator for a "full and fair redetermination" was not a final order appealable under 28 U.S.C. § 1291.

STATEMENT PURSUANT TO RULE 29.6

Respondent Hartford Life & Accident Insurance Company is a non-publically traded company that is wholly owned by Hartford Life, Inc.

Hartford Life, Inc. is a non-publically traded company that is wholly owned by Hartford Holdings, Inc.

Hartford Holdings, Inc. is a non-publically traded company that is wholly owned by The Hartford Financial Services Group, Inc., which is publically traded on the New York Stock Exchange.

Hartford Life, Inc., Hartford Holdings, Inc., and The Hartford Financial Services Group, Inc. are all holding companies.

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INTRODUCTION

Respondent Hartford Life & Accident Insurance Company submits this brief in opposition to the petition for a writ of certiorari filed by Shirley A. Graham. Contrary to petitioner's claims, the courts of appeals are not in disarray over the appealability of orders in ERISA cases that remand benefit determinations to plan administrators for further proceedings. Instead, there is a single outlier decision, rendered over eight years ago by the Seventh Circuit, that has had only limited impact in the Seventh Circuit itself, and has been rejected by every court of appeals that has considered its reasoning since. There is thus no reason to address the question petitioner raises unless and until the Seventh Circuit is given a chance to re-visit the issue and to decide whether it will adhere to a now widely repudiated view it expressed in a 1999 decision.

In all events, this case is a poor vehicle for addressing that question. Petitioner seeks a ruling on the appealability of ERISA remand orders in a case in which her principal claim is that ERISA does not apply at all. Petitioner could have sought review of that controlling legal question, however, without regard to the appealability of remand orders in ERISA cases, by simply moving for interlocutory review under 28 U.S.C. § 1292(b). Having declined to do so, she should not be permitted to use a minor conflict unique to ERISA to appeal an order she claims should never have been decided under ERISA in the fist place. Accordingly, the petition should be denied.

COUNTER STATEMENT OF THE CASE

1. Petitioner Shirley Graham worked as a rural letter carrier for the United States Postal Service from 1976 until 2000. Supplemental Appendix to Petition for a Writ of Certiorari ("Sup. Pet. App.") at 49a. She was also a member of the National Rural Letter Carrier's Association ("NRLCA"), the official bargaining representative for rural letter carriers employed by the Postal Service. *Id.* Because the Postal Service did not offer a disability-benefits plan to rural letter carriers, the NRLCA established its own plan and obtained a group long-term disability policy for its members from respondent Hartford Life & Accident Insurance Company. *Id.* at 43a.

Petitioner's health problems began in February 1994, when she twisted her knee and was forced to undergo arthroscopic surgery. Sup. Pet. App. at 50a. Although petitioner later returned to work, her condition deteriorated, prompting her first to accept a sedentary position in 1997 and eventually to retire in mid-2000. *Id.* Petitioner filed a claim for long-term disability benefits with respondent in October 2000, approximately three months after retiring. *Id.* Respondent denied petitioner's claim and rejected each of her three appeals. *Id.* at 50a-52a.

2. In February 2003, petitioner filed suit under the district court's diversity jurisdiction alleging that respondent breached its duty of good faith and fair dealing under Oklahoma law. Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 4a-5a. The district court ordered the parties to brief whether the Employee Retirement Income Security Act ("ERISA") applied to the suit. Sup. Pet. App. at 42a. In April 2005, the court rejected petitioner's contention that the disability-benefits plan offered by the NRLCA was exempt from ERISA under the "government plan

exclusion," 29 U.S.C. § 1003(b)(1). *Id.* at 47a. The court then concluded that ERISA preempted petitioner's state-law claims and ordered the parties to file a copy of the administrative record. *Id.* at 48a. Petitioner sought neither reconsideration of the district court's ruling nor certification of the issue for interlocutory appeal.

The district court held that respondent's decision denying the benefits claim had been arbitrary and capricious. Sup. Pet. App. at 54a. Applying the Tenth Circuit's decision in *Fought v. UNUM Life Ins. Co. of Am.*, 379 F.3d 997, 1006 (2004), the court began by finding that respondent operated under a conflict of interest as the claims administrator and the insurer of benefits. Sup. Pet. App. at 53a. Shifting the burden to respondent to establish that its decision was reasonable, *id.*,[1] the court ruled that respondent had not met its burden because it (1) had relied on petitioner's ability to work in a sedentary post first designed for her three years before she retired; (2) had given excessive weight to one statement by her treating physician while undervaluing other assessments; and (3) had failed to use an independent medical evaluation to resolve conflicting evidence. *Id.* at 54a-55a. But the court

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[1] This Court recently granted certiorari to consider both whether a claims administrator who also funds the ERISA plan operates under a conflict of interest and, if so, how that conflict should be taken into account on judicial review of a discretionary benefits determination. *Metro. Life Ins. Co. v. Glenn*, No. 06-923 (U.S. Jan. 18, 2008) (order granting Petition for a Writ of Certiorari). The Tenth Circuit is one of only two courts of appeals to shift to a plan admininstrator operating under a presumed conflict the burden of demonstrating the reasonableness of its decision. *See* Brief for United States as *Amicus Curiae* at 10, *Metro. Life Ins. Co. v. Glenn*, No. 06-923 (U.S. filed Dec. 21, 2007).

did not award benefits to petitioner, nor did it make any decision on whether petitioner was entitled to benefits. The court instead remanded the case with instructions that respondent undertake "a full and fair redetermination of the claim." *Id.* at 56a-57a.

Petitioner then moved for an award of attorney fees under 29 U.S.C. § 1132(g)(1). Affirming a report and recommendation from the magistrate judge, Sup. Pet. App. at 58a-64a, the district court denied petitioner's motion. *Id.* at 68a. The court observed that it had made no finding that respondent had acted in bad faith. *Id.* at 66a. Nor had it concluded that petitioner's "claim for benefits [wa]s particularly meritorious." *Id.* at 67a-68a. Indeed, the court noted that no decision has been made on the merits, and that it had specifically declined to hold "that 'it would be unreasonable for the plan administrator to deny the application for benefits on any ground.'" *Id.* at 68a (quoting *Caldwell v. Life Ins. Co. of N. Am.*, 287 F.3d 1276, 1289 (10th Cir. 2002)). Petitioner appealed both the order remanding for a full and fair determination and the order denying her motion for attorney fees. The two appeals were consolidated before the Tenth Circuit.

3. The court of appeals dismissed the appeal for lack of jurisdiction. Applying the definition of finality long ago articulated by this Court, Pet. App. at 9a, the court of appeals held that the remand order was not "final" and therefore was not appealable under 28 U.S.C. § 1291. The court "declined to adopt a hard-and-fast rule regarding whether a district court's order remanding a benefits determination to a plan administrator is final," *id.* at 10a, and instead considered whether rejecting an immediate appeal in this case "would violate basic judicial principles" and foreclose appellate review of "urgent and important"

issues. *Id.* at 11a-12a (internal quotation marks omitted). There was nothing "'urgent'" about the remand order here, the court concluded, because petitioner might well prevail on remand; she could challenge a renewed denial in the district court, with review available in the court of appeals; and she could renew her contention that ERISA did not apply to her suit following the proceedings on remand. *Id.* at 14a-16a. The court recognized that other circuits had taken slightly different approaches to the question of finality, but pointed out that petitioner "would fare no better" under all but one of those approaches. *Id.* at 17a-21a.

Finally, the court of appeals vacated the district court's denial of petitioner's motion for attorney fees, concluding that the motion was not ripe for resolution. The district court could not properly apply the test for awarding fees, the panel reasoned, without knowing whether petitioner was entitled to benefits under the plan and what impact the litigation would have on other beneficiaries. Pet. App. at 25a. Accordingly, the court instructed the district court to dismiss the motion without prejudice to refiling.

REASONS FOR DENYING THE PETITION

In seeking review of the lower court's jurisdictional ruling, petitioner mistakenly suggests that the courts of appeals are in disarray over the appealability of an order remanding an ERISA benefits claim to a plan administrator for further proceedings. In fact, all but one of the seven courts of appeals to address the issue treat ERISA remand orders as nonfinal, and thus not immediately appealable, unless the orders satisfy the collateral-order doctrine or a variant of that test. The lone exception is the Seventh Circuit, whose divided

1999 decision equating remands in the ERISA context with remands in Social Security cases has been rejected by the three courts of appeals to have considered it in the intervening eight years. There is no pressing need for review of that decision, which has had only limited impact in the Seventh Circuit itself, and this case is an inappropriate vehicle for resolving any tension created by the Seventh Circuit's solitary approach.

Indeed, petitioner asks this Court to decide the appealability of ERISA remand orders in a case in which her primary contention is that ERISA does not apply at all. It makes little sense to resolve a minor conflict unique to ERISA law in a case where petitioner seeks to invoke appellate jurisdiction in the hopes of establishing that the statute on which such jurisdiction is predicated does not apply. This is especially true given that the answer to the question presented would not necessarily hasten the disposition of the case. Petitioner's focus on the supposed inequities created by the prevailing jurisdictional rule is likewise unavailing, since the rule that she assails applies equally to bar challenges by plan administrators to remand orders favoring claimants. Finally, the specter of delay invoked by petitioner rings hollow in this case, where the benefits may well have already been paid had petitioner not appealed to the Tenth Circuit or sought review in this Court in an effort to revive her claim for compensatory and punitive damages.

I. ANOTHER CIRCUIT'S DIFFERING APPROACH TO DECIDING THE FINALITY OF ERISA REMAND ORDERS DOES NOT WARRANT REVIEW AT THIS TIME.

Petitioner's principal argument in support of certiorari is that the courts of appeals are divided on

the question of "when an ERISA remand order is a final appealable order." Pet. at 6, 15-16, 24, 33.[2] Although there are slight differences in the way the circuits assess the finality of ERISA remand orders, petitioner mischaracterizes the nature and extent of those differences and overlooks the fact that six of the seven courts of appeals to address the issue generally deem such orders nonfinal. Neither the contrary ruling from one court nor the silence of the remaining regional circuits favors review in this case.

A. The Vast Majority Of The Courts Of Appeals Treat ERISA Remand Orders As Nonfinal Decisions Immediately Appealable Only Under The Collateral-Order Doctrine Or A Close Analogue.

A district court decision is "final," and thus appealable under 28 U.S.C. § 1291, where that decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 204 (1999) (internal quotation marks omitted). The Court has adhered to this definition for over sixty years, *see Catlin v. United States*, 324 U.S. 229, 233 (1945), declining to carve out exceptions that could "overpower the substantial finality interests

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[2] Petitioner also argues that the circuits have divided over "when remand to a Plan Administrator would be appropriate." Pet. at 6. But petitioner identifies no cases exhibiting such a split, and remand remains a widely accepted remedy. The courts of appeals agree, for example, that remand to the plan administrator is the appropriate remedy where the problem arises from the integrity of the plan's decisionmaking process, rather than from the plan's denial of benefits to which a claimant is clearly entitled. *See, e.g., Elliott v. Metro. Life Ins. Co.*, 473 F.3d 613, 622 (6th Cir. 2006); *Buffonge v. Prudential Ins. Co. of Am.*, 426 F.3d 20, 31-32 (1st Cir. 2005).

§ 1291 is meant to further." *Will v. Hallock*, 546 U.S. 345, 350 (2006).

Adhering to this Court's settled interpretation of finality, most courts of appeals to consider the question have held a district court's order remanding a benefits claim to an ERISA plan administrator for further proceedings to be nonfinal. *See Petralia v. AT&T Global Info. Solutions Co.*, 114 F.3d 352, 354 (1st Cir. 1997); *Bowers v. Sheet Metal Workers Nat'l Pension Fund*, 365 F.3d 535, 536 (6th Cir. 2004); *Shannon v. Jack Eckerd Corp.*, 55 F.3d 561, 563 (11th Cir. 1995) (per curiam); *see also Borntrager v. Cent. States, Se. & Sw. Areas Pension Fund*, 425 F.3d 1087, 1091 (8th Cir. 2005) (reaching same conclusion outside of benefits context). These courts have reasoned that, rather than leaving nothing to be done except execution of the judgment, an order remanding to the plan administrator *mandates* further proceedings and often additional findings. *See Petralia*, 114 F.3d at 354; *Shannon*, 55 F.3d at 563. Remand orders also fail to resolve definitively the amount of damages or other relief to which a claimant may be entitled. Courts have consequently concluded that remand orders do not qualify as "final" under this Court's decision in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744 (1976), which established that district court orders leaving the "assessment of damages or awarding of other relief . . . to be resolved" are not "'final' within the meaning of 28 U.S.C. § 1291." *See Bowers*, 365 F.3d at 536; *see also Rekstad v. First Bank Sys., Inc.*, 238 F.3d 1259, 1262 (10th Cir. 2001).

Because ERISA remand orders typically do not end the litigation, the remaining question is whether those orders are nevertheless appealable on another ground. The First, Eighth, and Eleventh Circuits

have evaluated the appealability of ERISA remand orders under the collateral-order doctrine. *Petralia*, 114 F.3d at 354; *Borntrager*, 425 F.3d at 1092; *Shannon*, 55 F.3d at 563-64. Applying the "'stringent'" conditions of this doctrine, *Will*, 546 U.S. at 349, the First and Eleventh Circuits have declined to exercise collateral-order jurisdiction over orders remanding to an ERISA plan adminstrator for a fresh determination of the claimant's eligibility for benefits. The eligibility question, those courts explained, is not collateral to, but is instead at "the very heart of" (or "inextricably intertwined with the merits of") the decision to remand. *Petralia*, 114 F.3d at 354; *Shannon*, 55 F.3d at 563. Nor does a remand order either conclusively establish a claimant's entitlement to benefits or foreclose review of the entitlement question on appeal from the final judgment entered by the district court. The Eighth Circuit has reached the same conclusion outside of the benefits-denial context. *Borntrager*, 425 F.3d at 1092-93 (finding no collateral-order jurisdiction over a district court order remanding for further development of the record and additional discovery in a company's suit alleging wrongful expulsion from a multi-employer pension fund).

Two other courts of appeals—the Ninth and Tenth Circuits—apply a somewhat more permissive version of the collateral-order doctrine. *See* Pet. App. at 11a; *Hensley v. Nw. Permanente P.C. Ret. Plan & Trust*, 258 F.3d 986, 993 (9th Cir. 2001), *overruled on other grounds, Abatie v. Alta Health & life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006). The Ninth Circuit has explained that "[a]n order remanding a case to an [ERISA plan administrator] is appealable only when: (1) the district court order conclusively resolve[d] a separable legal issue; (2) the remand order forces the

[plan] to apply a potentially erroneous rule which may result in a wasted proceeding; and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable." *Id.* (internal quotation marks omitted) (third alteration in original). This test both strongly resembles and has its origins in the collateral-order doctrine. *See Borntrager*, 425 F.3d at 1091-92. In applying this variant of the collateral-order doctrine, the Ninth Circuit has found ERISA remand orders to be final (and hence appealable) in some but not all cases.[3]

The Tenth Circuit likewise decides the finality of ERISA remand orders "on a case-by-case basis," *Rekstad*, 238 F.3d at 1263, finding appellate jurisdiction where review of the order is necessary to ensure that the court of appeals will have an opportunity to resolve "important legal questions which a remand order may make 'effectively unreviewable.'" *See* Pet. App. at 12a (quoting *Rekstad*, 238 F.3d at 1262). Appellate jurisdiction will lie only "when the issue presented is urgent" and when "the danger of injustice due to delay outweighs the inconvenience and costs of piecemeal review." *Id.* (internal citations and quotation marks omitted). The Tenth Circuit has yet to find an ERISA remand order that qualifies as final under its test.[4]

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[3] *Compare Banuelos v. Constr. Laborers' Trust Funds*, 382 F.3d 897, 903 (9th Cir. 2004) (jurisdiction), *Schikore v. BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 959 n.1 (9th Cir. 2001) (same), *and Hensley*, 258 F.3d at 994 (same), *with Fisher v. Aetna Life Ins. Co.*, 184 F. App'x 609, 610 (9th Cir. 2006) (mem.) (no jurisdiction), *and Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1251-52 (9th Cir. 1998) (same).

[4] *See* Pet. App. at 15a; *Garner v. US West Disability Plan*, 506 F.3d 957, 960 (10th Cir. 2007); *Metzger v. UNUM Life Ins. Co. of*

In sum, despite differences in nomenclature, most courts of appeals take a similar approach to deciding the finality of ERISA remand orders. These circuits hold that, because remand orders leave more to do than simply execute the judgment, the orders qualify as final only if they satisfy the "stringent" requirements of the collateral-order doctrine or a close analogue thereto.

B. Petitioner Mischaracterizes The Controlling Law In At Least Three Circuits.

Petitioner seizes upon the slight differences described above in insisting that the district court's remand order in this case would have been appealable in the First, Fourth, and Ninth Circuits. Pet. at 33. This is plainly incorrect.

To begin with, petitioner confuses the appealability of a remand order with the standard of review that appellate courts apply in assessing challenges to a district court's choice of remedy. Pet. at 17-23 (quoting *Cook v. Liberty Life Assur. Co. of Boston*, 320 F.3d 11 (1st Cir. 2003), and *Grosz-Salomon v. Paul Revere Life Ins. Co.*, 237 F.3d 1154 (9th Cir. 2001)). There was no question in either *Cook* or *Grosz-Salomon* that the respective district court orders vacating the plan's decisions and retroactively awarding benefits were final and appealable. Those cases decided only that appellate courts "review[] a district court's choice of remedy for an ERISA violation" under the abuse-of-discretion standard. *See Cook*, 320 F.3d at 24; *Grosz-Salomon*, 237 F.3d at 1163. But abuse-of-discretion review is available only where the court of appeals otherwise has jurisdiction

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Am., 476 F.3d 1161, 1165 (10th Cir. 2007); *Rekstad*, 238 F.3d at 1263.

over a challenged order—a point that was neither contested nor raised in *Cook* or *Grosz-Salomon*.

Moreover, in quoting the *Cook* opinion out of context, petitioner overlooks the clear import of the First Circuit's controlling decision in *Petralia*, 114 F.3d at 354. As explained above, *Petralia* dictates that petitioner's appeal would be dismissed for lack of jurisdiction in the First Circuit. That court would treat the remand order as nonfinal and, because the decision to remand was intertwined with the merits of the benefits claim, would decline to exercise jurisdiction under the collateral-order doctrine. *Id.*

Petitioner also fails to cite any authority to support her contention that the Fourth Circuit would deem the challenged remand order final. Pet. at 33. This is likely because no such authority exists; the Fourth Circuit quite simply has not decided the issue.

Nor would the Ninth Circuit deem the remand order in this case appealable. While the district court's ruling that ERISA applied to the plan might constitute "'a separable legal issue'" eligible for review, *Hensley*, 258 F.3d at 993, it remains reviewable upon appeal from the final judgment entered by the district court following the proceedings on remand. *See id.* Petitioner can move to reopen her case or file an amended complaint in the district court if her benefits claim is denied on remand, and she can still "appeal the district court's decision that ERISA preempts her state law claim, and if successful, she will be able to pursue punitive damages." Pet. App. at 15a-16a. Review of the district court's resolution of that threshold issue is not "'foreclosed'" simply because petitioner must wait until after final judgment to contest the remand order. *See Hensley*, 258 F.3d at 993; Pet. App. at 16a. The Tenth Circuit therefore correctly concluded that

petitioner "would fare no better" in most other circuits. *Id.* at 17a. The lone exception, as that court recognized, is the Seventh Circuit. *Id.* at 19a-20a.

C. The Seventh Circuit Should Have The Opportunity To Reconsider Its Approach To The Finality Of ERISA Remand Orders.

In *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975 (1999), a divided panel of the Seventh Circuit held that a district court order finding error and remanding a benefits claim to an ERISA plan administrator constitutes a final order appealable under § 1291. The panel majority started from the premise that remands are justified in the ERISA context because a "plan makes the same kind of decisions as the Social Security Administration [SSA]." *Id.* at 978. The court then looked to this Court's decisions on the appealability of district court orders remanding claims to the SSA, which have focused on the language of 42 U.S.C. § 405(g). *Id.* This Court has held that, in a so-called "sentence four" remand, a district court enters a final, appealable order affirming, modifying, or reversing the SSA's decision. *Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990). That order can be appealed by either the claimaint or the SSA. *Forney v. Apfel*, 524 U.S. 266, 267 (1998). In contrast, a "sentence six" remand requires further evidentiary proceedings before the agency, is ordered before the district court has ruled on the propriety of the SSA's decision, and does not qualify as a final and appealable order. *See Finkelstein*, 496 U.S. at 626.

The *Perlman* majority attempted to draw a comparable line for ERISA cases. "If the district court finds that the [plan's] decision was erroneous and enters a judgment wrapping up the litigation,"

the court held, "that decision is appealable even if extra-judicial proceedings lie ahead; but if the court postpones adjudication until after additional evidence has been analyzed, then it has not made a final decision." 195 F.3d at 979. The same result would obtain, the court went on to observe, if the ERISA remand order were treated like an order remanding a claim to an arbitrator. *Id.* at 979-80.[5]

Judge Wood dissented on the merits and, although she agreed that the court had jurisdiction, strongly disagreed with the majority's reasoning on that point. The majority's analogy to the Social Security context, she wrote, was "tortured." *Id.* at 984. Not only are there important structural differences between the two settings, but the sentence four/sentence six line from the Social Security system "cannot be translated into an ERISA action." *Id.* at 985. This is largely because there is nothing in the ERISA field like a section-six remand; all ERISA remands occur *after* the district court has found some error—"either substantive or procedural"—in the plan's decision. *Id.* at 984-85.

The Seventh Circuit's minority—indeed, solitary—position does not warrant review of the decision in

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[5] The arbitration analogy rested in part on the view that this Court's decision in *Forney* "completed the process of making administrative remands generally appealable." 195 F.3d at 979. But *Forney* has not been read so broadly. *See Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113, 119 (3d Cir. 1999) ("[*Forney*] speaks only to appellate jurisdiction under statutes containing language comparable to that found in the Social Security Act"). Indeed, the prevailing rule has been and remains that orders remanding a matter to an administrative agency for further proceedings do not qualify as final. *E.g.*, *Pueblo of Sandia v. Babbit*, 231 F.3d 878 (D.C. Cir. 2000); *see also* 15B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3914.32 & n.11 (2d ed. 1992 & Supp. 2007).

this case for several reasons. To begin with, *Perlman*'s limited jurisdictional holding has had only a limited impact in the Seventh Circuit itself. In the more than eight years since *Perlman* was decided, the Seventh Circuit appears to have relied on it only once in finding appellate jurisdiction over a district court's remand order in an ERISA case. *Davis v. Unum Life Ins. Co. of Am.*, 444 F.3d 569, 574 n.1 (7th Cir.), *cert. denied*, 127 S. Ct. 234 (2006). The limited effect of *Perlman*'s jurisdictional holding is further underscored by a series of decisions in which the Second Circuit has declined to decide the finality of ERISA remand orders. *See Giraldo v. Bldg. Serv. 32B-J Pension Fund*, 502 F.3d 200 (2d Cir. 2007) (per curiam); *Viglietta v. Metro. Life Ins. Co.*, 454 F.3d 378 (2d Cir. 2006) (per curiam). Resolving the question as a general matter was unnecessary, the court reasoned in each case, because the remand order at issue would not be appealable under *any* of the existing tests—including the one employed by the Seventh Circuit. *Giraldo*, 502 F.3d at 202; *Viglietta*, 454 F.3d at 379.

Furthermore, no other court of appeals has agreed with the Seventh Circuit's jurisdictional ruling or endorsed the analogies on which that ruling rests. Since *Perlman*, three courts of appeals—the Sixth, Eighth, and Tenth Circuits—have addressed the jurisdictional question as one of first impression. *Borntrager*, 425 F.3d at 1090; *Bowers*, 365 F.3d at 536; *Rekstad*, 238 F.3d at 1262; *see also* Pet. App. at 20a-21a. All three of these courts have expressly noted the Seventh Circuit's *Perlman* decision. All three of them have expressly rejected the conclusion reached in that case. Two of those courts predicated their rejection of *Perlman* on what Judge Wood pointed out in her dissenting opinion—that the

Perlman majority's analogy to the Social Security context is untenable in light of the specific statutory language that gave rise to this Court's decisions in *Finkelstein* and *Forney*. 195 F.3d at 984 (Wood, J., dissenting); *see Borntrager*, 425 F.3d at 1091 (calling the analogy "unsound"); *Bowers*, 365 F.3d at 538 (declining "to expand its jurisdiction by analogy").

Given *Perlman*'s limited impact even within the Seventh Circuit and the rejection of that decision by the other court of appeals that have considered it, the soundest course is to allow the Seventh Circuit the opportunity to reconsider its position in a future case. The fact that five regional circuits—the Second, Third, Fourth, Fifth, and District of Columbia—have yet to weigh in on the jurisdictional question renders that course all the more advisable and counsels strongly against immediate review by this Court.

II. THIS CASE IS A POOR VEHICLE FOR ADDRESSING THE QUESTION PRESENTED.

Even if the question presented were worthy of the Court's attention, this case suffers from a number of infirmities that weigh decisively against review.

First, petitioner asks this Court to decide the appealability of ERISA remand orders in a suit that—according to petitioner—is not even subject to ERISA. ERISA's applicability was the threshold issue litigated in the district court. Sup. Pet. App. at 42a. That issue was the focus of petitioner's efforts, since its resolution determined whether petitioner could proceed with her state-law claims and thus whether compensatory and punitive damages could be available to her. Pet. App. at 16a n.6. But after the district court ruled that ERISA applied, petitioner did not seek to certify that decision for

interlocutory appeal under 28 U.S.C. § 1292(b). As the court of appeals noted, petitioner instead "acquiesced to the district court's conversion of the suit to one stating an ERISA claim." *Id.* at 10a n.2.[6] This Court should not expend its resources to resolve a minor (and potentially self-correcting) conflict that is unique to ERISA at the behest of a litigant who seeks to invoke appellate jurisdiction to assert that the statute upon which that jurisdiction is grounded is inapplicable. This is particularly true where petitioner did not even try to establish ERISA's inapplicability through an interlocutory review mechanism far less extraordinary than a writ of certiorari.

Second, further proceedings would almost certainly be required in the district court regardless of how this Court resolved the jurisdictional question. Neither the district court nor the court of appeals determined whether petitioner was actually entitled to benefits. At the very least, therefore, the district court would be required to address this issue, and another appeal by either party could result. In addition, because the court of appeals vacated the district court order denying petitioner's motion for attorney fees, petitioner would have to reapply for fees in the district court following *either* the remand proceedings before the plan *or*, should this Court reverse the

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[6] It is no answer to say, as petitioner does, that the district court's order was interlocutory in nature. Pet. at 2. Section 1292(b) expressly governs orders that are "not otherwise appealable." Nor would it necessarily have been futile to seek certification from the court of appeals, which has recently accepted § 1292(b) certifications to resolve important issues in ERISA cases. *See, e.g.*, *Millsap v. McDonnell Douglas Corp.*, 368 F.3d 1246, 1248 (10th Cir. 2004) (availability of backpay as remedy); *Kidneigh v. UNUM Life Ins. Co. of Am.*, 345 F.3d 1182, 1183 (10th Cir. 2003) (preemption of state-law claims).

judgment below, an eventual remand from the Tenth Circuit.[7] Proceedings in the district court would only multiply, moreover, if petitioner prevailed before the Tenth Circuit on her principal argument that ERISA does not apply to her benefits plan. Resolution of the jurisdictional question, and in particular resolution of that question in petitioner's favor, will do little to hasten the disposition of this case.

Third, petitioner's focus on the supposedly invidious incentives produced by the court of appeals' ruling overlooks the crucial fact that the limits on appealing ERISA remand orders apply equally to plans and plan participants. At times claimaints feel aggrieved by a remand order and, as petitioner did here, seek appellate review. *See, e.g.*, Pet. App. at 2a; *Banuelos v. Constr. Laborers' Trust Funds*, 382 F.3d 897, 900 (9th Cir. 2004); *Petralia*, 114 F.3d at 353. In other instances, it is the plan that finds fault with the district court's decision and, realizing that it may have no other opportunity to vindicate its position in court, will attempt to take an appeal. *See Bowers*, 365 F.3d at 536; *Hensley*, 258 F.3d at 989; *Shannon*, 55 F.3d at 562. There are also situations where a remand order leaves both sides dissatisfied—the claimant because she wants an outright award of benefits and the plan because it seeks affirmance of its decision—and prompts both to appeal the ruling. *See Garner v. US West Disability Plan*, 506 F.3d 957, 959 (10th Cir. 2007); *Rekstad*, 238 F.3d at 1261; *Perlman*, 195 F.3d at 977. But courts have generally

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[7] The district court has already implemented the court of appeals' ruling by entering an order formally vacating its previous denial of the motion for attorney fees and dismissing petitioner's motion without prejudice to refiling. *Graham v. Hartford Life & Accident Ins. Co.*, No. 03-CV-0144-CVE-SAJ (N.D. Okla. Sept. 24, 2007) (Dkt. #56).

found the challenged orders to be nonfinal without regard to the identity of the appealing party or to the fact that both parties sought review. The prevailing rule, in short, cuts both ways.

Finally, petitioner's repeated references to the delay caused by her inability to take an immedaite appeal ring hollow. *See* Pet. at 5, 33, 36. Had petitioner allowed the remand to proceed before the plan, she may well have already received the benefits to which she believes she is entitled. Any additional delay in receiving those benefits is attributable principally (if not exclusively) to her decision to appeal the favorable remand order to the Tenth Circuit and now to seek review in this Court. This course of action reveals that petitioner is primarily interested not in long-term disability benefits, but in the compensatory and punitive damages that may be available under the state-law causes of action pled in her complaint. *See* Pet. App. at 16a n.6; Sup. Pet. App. at 47a-48a. Given these motives, there is no reason to credit petitioner's unsupported assertions that disability plans profit from "defer[ing] payments" to deserving claimants or that the remedy of remand somehow "encourages [the] wrongful denial" of benefits. Pet. at 5, 36. As the court of appeals correctly observed, the availability of attorney fees—of which "bad faith" on the part of the plan is a component, *see Gordon v. United States Steel Corp.*, 724 F.2d 106, 108-09 (10th Cir. 1983)—serves as a powerful check against unwarranted delays. Pet. App. at 17a & n.7.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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